

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



76-1337

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 76-1337

B  
PPS

UNITED STATES OF AMERICA,

Appellee,

against

NELSON CRUZ,

Defendant-Appellant.

---

APPENDIX

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MORRISON, PAUL, STILLMAN & BEILEY  
110 EAST 59<sup>TH</sup> STREET  
NEW YORK 10022

Attorneys for Defendant-Appellant

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Defy Name Plaintiff RGEES	JUDGE/ MAGISTRATE 0208 District Office	Assigned Trial 0345 Disp./Sentance	U.S. vs. CRUZ, NELSON	24 11/75 1150 No. 07 of Defendants
U.S. COURT SECTION: 18:371 18:659		OFFENSES: Consp. to steal fr. interstate shipmt. Theft fr. interstate shipment.		COUNTS: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 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DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
5-76	from custody under Section 5017(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that Division. COUNT #2 DISMISSED on motion of Deft's counsel with the consent of the Government. Deft. is released on his own recognizance until February 23, 1976, at 10:30 A.M. at which time he is to surrender to the U.S. Marshal.—FRANKEL,J. Filed CJA Form #23 Financial Affid.				
5-20-76	Filed Deft's Notice of Motion for reduction of sentence... Entered 5-28-76-9:30AM.Rm 2704.				
1-05-76	Filed commitment & entered return, Deft delivered to M.C.C. 1/4/76				
1-14-76	Filed memorandum of law on behalf of deft Nelson Cruz at the request of this in connection with this consideration of the validity of the sentence imposed on deft				
3-76	Filed OPINION # 44730 The U.S. Attorney is instructed, therefore, to convey the Court's views to the Attorney General & to report to the Court & deft's counsel within ten days whether the Bureau of Prisons & the Parole Commission will administer the judgment in accordance with its terms. Should the situation remain uncorrected or incompletely corrected, deft's able & energetic counsel may be obliged to bring a different form proceeding, here or in any appropriate forum, to see that the flouting of the judgment is ended. the foregoing is to declare the rights of the parties in the premises & embodies the court's order on the pending motion.				
4-11-76	....Frankel,J. M/H				
4-11-76	Filed MEMORANDUM AMENDING OPINION #44730 - The Opinion of July 8, 1976, is amended as follows: At footnote 1, page i, line 3, the figure "35,000" is amended to read "\$10,000" and the word "ten" is amended to read "five." IT IS SO ORDERED...FRANKEL,J. (n/n)				
4-10-76	Filed deft's Notice of Appeal to the U.S.C.A. for the 2nd Circuit from the order of the U.S. District Court for the SDNY, dated and entered July 8, 1976. (m/n's)				
7-23-76	Filed Memorandum & Order that by letter dtd 7-22-76, the US Atty has stated the position of the Gov't on the administration of the Court's judgment. It appears that those who have Mr. Cruz incarcerated plan to follow their own rather than the court's understanding of the judgment notwithstanding that no appeal was ever taken from that adjudication. Accordingly, the court anticipates that the deft's able counsel will proceed promptly to bring an appropriate form of action, here or elsewhere, to compel obedience to the judgment of the court. This is necessary, in the court's view, since, the notice for reduction was not an effective device to accomplish the correction deemed necessary.....FRANKEL,J. n/m				
7-29-76	Filed letter dated June 8-76, from Assist. U.S. Atty. Allen R. Bentley to Judge Frankel				
7-29-76	Filed letter dated June 16-76, from Benjamin Zellermyer, Counsel for deft., to Judge Frankel				
7-29-76	Filed letter dated June 25-76, from Assist. U.S. Atty. Bentley to Judge Frankel				
7-30-76	Filed letter dated July 7-76, from Benjamin Zellermyer, to Judge Frankel				
7-30-76	Filed letter dated July 22-76, from Assist. Atty. Bentley to Judge Frankel				
7-30-76	Filed stipulation for partial record to U.S.C.A. pursuant to Rule 11(F)(2)(B)(ii) to Section 10(b) of Title 28, U.S.C. Total Days				

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

- v -

: INDICTMENT

WILLIE JOHNSON,  
HERBERT BANKS,  
NELSON CRUZ, and  
CHARLES RUBINSTEIN,  
Defendants. :  
-----x

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of June, 1975, up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, WILLIE JOHNSON, HERBERT BANKS, NELSON CRUZ and CHARLES RUBINSTEIN, the defendants, did unlawfully, wilfully, and knowingly combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury known and unknown to commit certain offenses against the United States, to wit, violations of Section 659 of Title 18, United States Code.

2. It was part of said conspiracy that WILLIE JOHNSON, HERBERT BANKS and NELSON CRUZ, the defendants, would unlawfully, wilfully, knowingly and with intent to convert to their own use embezzle, steal, take, carry away and conceal from a motor truck goods and chattels having a value in excess of one hundred dollars (\$100) which were moving as, were part of, and constituted an interstate shipment of freight, express and other property.

3. It was a further part of said conspiracy that the defendant CHARLES RUEINSTEIN would unlawfully, wilfully and knowingly buy, receive and have in his possession such goods and chattels having a value in excess of one hundred dollars (\$100) knowing the said goods and chattels to have been embezzled and stolen.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about October 29, 1975, at 306 West 142nd Street, New York, New York, the defendant HERBERT BANKS spoke on the telephone with the defendant WILLIE JOHNSON.

2. On or about October 29, 1975, at 80 West 170th Street, Bronx, New York, the defendant NELSON CRUZ spoke on the telephone with the defendant WILLIE JOHNSON.

3. On or about October 30, 1975, at about 6:30 A.M., the defendant NELSON CRUZ drove the defendants WILLIE JOHNSON and HERBERT BANKS to the vicinity of 550 West 38th Street, New York, New York.

4. On or about October 30, 1975, at about 6:30 A.M., in the vicinity of 550 West 38th Street, New York, New York, the defendant NELSON CRUZ parked a truck operated by L&J World Distributors, Inc. alongside another truck operated by H.O.T. Delivery Co., Inc.

5. On or about October 30, 1975, in the vicinity of 550 West 38th Street, New York, New York, the defendant WILLIE JOHNSON pointed a gun at the head of the driver of the H.O.T. truck.

6. On or about October 30, 1975, at said location, WILLIE JOHNSON and HERBERT BANKS, the defendants, placed the driver of the H.O.T. truck, who had been handcuffed, into the freight compartment of said truck.

7. On or about October 30, 1975, the defendant HERBERT BANKS drove the H.O.T. truck from the vicinity of 550 West 38th Street, New York, New York, to Jersey City, New Jersey.

8. On or about October 30, 1975, the defendant WILLIE JOHNSON drove a truck operated by L&J World Distributors, Inc. from New York, New York, to Jersey City, New Jersey.

9. On or about October 30, 1975, in the vicinity of Jersey City, New Jersey, WILLIE JOHNSON and HERBERT BANKS, the defendants, removed the labels from 37 cartons containing cotton piece goods and transferred them from the H.O.T. truck to the L&J World Distributors truck.

10. On or about October 30, 1975, WILLIE JOHNSON and HERBERT BANKS, the defendants, delivered said cotton piece goods to Milgood Fabrics, Inc. on West 40th Street, New York, New York.

11. On or about October 30, 1975, the defendant CHARLES RUBINSTEIN paid the defendant WILLIE JOHNSON two-thousand one hundred and fifty dollars (\$2,150) for said cotton piece goods.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 30th day of October, 1975, in the Southern District of New York, WILLIE JOHNSON, HERBERT BANKS and NELSON CRUZ, the defendants, unlawfully, wilfully, knowingly and with intent to convert to their own use, did embezzle, steal, take, carry away and conceal from a motortruck

operated by H.O.T. Delivery Co., Inc. goods and chattels having a value in excess of one hundred dollars (\$100), namely, approximately 36 cartons of cotton piece goods, which were moving as, were part of, and constituted an interstate shipment of freight, express and other property.

(Title 18, United States Code, Sections 659 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 30th day of October, 1975, in the Southern District of New York, the defendant CHARLES RUBINSTEIN unlawfully, wilfully and knowingly did buy, receive and have in his possession goods and chattels having a value in excess of one hundred dollars (\$100), namely, the repackaged contents of approximately 36 cartons of cotton piece goods which were moving as, were part of and constituted an interstate shipment of freight, express and other property and which had been embezzled, stolen, taken, carried away and concealed as set forth in Counts One and Two of this indictment, knowing the same to have been embezzled and stolen.

(Title 18, United States Code, Section 659.)

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FORMAN

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THOMAS J. CAVILL

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 -----X

4 UNITED STATES OF AMERICA, :

5 vs. : 75 Cr. 1150

6 NELSON CRUZ, :

7 Defendant. :

8 -----X

9 February 11, 1976  
10:00 a.m.

10 Before: HON. MARVIN E. FRANKEL,  
11 District Judge

12

13

14

APPEARANCES

15 THOMAS J. CAHILL, ESQ.  
16 United States Attorney for the  
Southern District of New York

17 BY: ALLEN R. BENTLEY,  
18 Assistant United States Attorney

19

20 BENJAMIN ZELERMYER, ESQ.,  
Attorney for the Defendant.

21

22 Also Present:

23 Nina Rao Cameron,  
24 Immigration and Naturalization Agency.

25

1 bjmjt

2

2 MR. BENTLEY: The government is ready, your  
3 Honor.

4 MR. ZELERMYER: The defendant is ready, your  
5 Honor.

6 MR. BENTLEY: With me at counsel table is Mrs.  
7 Cameron. I would like to introduce her.

8 THE COURT: I knew her before you did. I am  
9 pleased to have you introduce her.

10 I assume she is here in connection with the  
11 motion effecting the possibility of deportation. I think  
12 we can dispose of that first.

13 As I understand the government's position, it is  
14 not claimed that Mr. Cruz is subject to deportation at  
15 this time because it is not claimed that the first the  
16 two offenses to which defense counsel addresses himself  
17 was a felony.

18 MRS. CAMERON: Did not involve moral turpitude.

19 THE COURT: Did not involve moral turpitude, and  
20 with that understanding there being no effort intended to  
21 deport him as the result of the instant offense, and it  
22 does not seem to me that there is any justification in  
23 the kind of determination that the defendant -- well, I  
24 will deny the motion now in any event.

25 I do not see any special appeal in Mr. Cruz's

1 bjmjt

2 situation with respect to this most serious crime that  
3 would warrant my recommending as a Judge that it not be  
4 taken into account for a possible ground for deportation.

5 I know he has been here since he was nine years old or  
6 thereabouts, and I know the statute is absurd in that re-  
7 spect, but it is not for me to revise the law.

8 Insofar as the law indicates that there is a  
9 dispensing power, I do not think it is a case where it  
10 is exercised at all.

11 I have read all the papers, and I deny the  
12 motion as it is addressed to me now without prejudice  
13 however, to any later reconsideration of this subject  
14 by some other Judge, me or somebody else, if and when  
15 Mr. Cruz should have the misfortune of committing another  
16 offense involving moral turpitude as the circumstances  
17 may then appear.

18 It may be that this particular case will look  
19 different in the light of the history or the next case  
20 which I hope does not happen, but in any event, I do not  
21 see any occasion for granting a dispensing declaration,  
22 if that is what it shall be called at this time.

23 With that, let us proceed to the sentence. I  
24 have read the pre-sentence report. I am ready to hear  
25 from counsel and the defendant. Mr. Bentley, do you have

1 bjmjt

4

2 anything to say at this time?

3 MR. BENTLEY: I would merely like to call the  
4 Court's attention to the fact that after initially denying  
5 involvement in this hijacking, Mr. Cruz did give a state-  
6 ment to the F.B.I. and also accompanied the F.B.I. agents  
7 to the vicinity of a co-defendant's residence, where the  
8 co-defendant was apprehended.

9 To that extent, he has cooperated with the  
10 government in this case.

11 THE COURT: Thank you, Mr. Bentley. Mr.  
12 Zelermeyer?

13 MR. ZELERMYER: May it please the Court, in the  
14 two months or so that I have known Nelson Cruz, I have  
15 seen him maybe a dozen times. But I think I have gotten  
16 to know him a little bit during that time.

17 I too have read, as your Honor has, the pre=  
18 sentence report which notes the voluntary statement that  
19 Mr. Cruz made to the F.B.I. which notes Mr. Cruz's  
20 complete cooperation with the probation office.

21 Mr. Cruz's expressions of remorse, his intelli-  
22 gence, the stability of his married life, the commitment  
23 to the work ethic, and which describes Mr. Cruz's family,  
24 his background, his education, his employment, his prior  
25 brushes with the law and the events underlying this

1 bjmjt

5

2 indictment.

3           I also note the pre-sentence report gives Mr.  
4 Cruz a very good rating on the relief guidelines and I  
5 think on the whole the report is a fair one. But, as I  
6 sat and read the report, I felt that it did not completely  
7 describe the Nelson Cruz that I have come to know over  
8 these last few months.

9           It did not describe the Nelson Cruz who in his  
10 teens attended work camps in Vermont, and learned about  
11 the wilderness in this country. And learned to build  
12 log cabins from the ground up. It did not describe the  
13 Nelson Cruz who began to attend the National Outdoor  
14 Leadership Training School as a guest, and wound up as a  
15 graduate in 1971, or the Nelson Cruz who has travelled  
16 miled up into New York to climb the mountains. It did  
17 not describe the Nelson Cruz who played on his high school  
18 chess team, and even now discusses with me the match  
19 between Fischer and Spassky. He replays the himself to  
20 improve his own game. He discusses with a gleam in his  
21 eye the sharpness of their play.

22           It does not describe the Nelson Cruz whose  
23 preference in music runs to Beethoven or Tschaikowsky  
24 which his friends and wife do not understand. It does  
25 not describe the Nelson Cruz who has a dream, who has an

1       bjmit  
2       ambition, a goal. A goal to own his own truck and  
3       tractor, and run his own business. Not so much for  
4       the mere money or wealth that entrepreneurship can  
5       bring, but, more for the ability to buy a house out  
6       in the country in Vermont or Connecticut where his  
7       whole family can come to live, his wife, their expected  
8       child, her mother, his parents.

9                  Why did this Nelson Cruz who loves Beethoven,  
10      who plays chess, and who has this dream, why did he  
11      participate in this, as your Honor has described it,  
12      a most serious crime, and it is? Nelson Cruz is not a  
13      wealthy man. Like most of us, he works very hard to  
14      make ends meet. He works so hard. As a matter of fact,  
15      because he knew he would not be at work during the day  
16      today, he got up in the middle of the night to make a  
17      run for his employer that he completed at 7 o'clock  
18      in the morning to be here on time.

2       19                  Christmas of 1975 was approaching, and Nelson  
3       Cruz did not have money to buy presents for his family  
4       when Willie Johnson called and Nelson Cruz was tempted  
5       by the opportunity to earn what looked like a few easy  
6       dollars to buy presents for his family. He did not know  
7       there would be a weapon involved and a driver taken and  
8       thrown in the back of a truck and driven to New Jersey.

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7

2 This was not the idea. The whole thing was not his  
3 idea. I think the distinction between Mr. Cruz's role  
4 in these events, and the role of his co-defendants has  
5 been indicated as much as anything by the government's  
6 consent to plead to count one of the indictment, for  
7 Mr. Cruz to plead to the conspiracy count rather than  
8 the substantive offenses. Mr. Cruz is not an experienced  
9 criminal. He did not even know how much money he was  
10 going to get, and never found out. But he yielded to  
11 this temptation.

12 I think your Honor has seen first hand what  
13 this has already done to Nelson Cruz. Your Honor saw  
14 when we were here when the plea was entered that when  
15 it came time to explain to your Honor why he participated,  
16 Nelson Cruz wept openly. I asked him why, why he was  
17 crying. He said, "I'm ashamed. I'm ashamed of what I  
18 did. I've let my family and this country down. I've  
19 let my wife down who depends on me to support her unborn  
20 child." I believe your Honor, that Nelson Cruz has  
21 exhibited remorse as Mr. Ahearn of the probation office  
22 noted in his cooperation with the F.B.I. which Mr.  
23 Bentley has confirmed, and his cooperation with the pro-  
24 bation department. It would be presumptuous of me to  
25 attempt to present to your Honor the goals of our

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8

2 sentencing processing or what factors should enter into  
3 your Honor's decision and form that decision. I merely  
4 ask that you consider, your Honor, most importantly not  
5 just what is written on papers in the pre-sentence report  
6 or in the affidavit or in the letters that have been sub-  
7 mitted, because those letters, those papers, that black  
8 and white typing cannot do justice, cannot describe fully  
9 Nelson Cruz.

10 I ask your Honor to consider whether Incarcera-  
11 ting Mr. Cruz at this point in his life, separating him  
12 from his wife and his family, would deter anyone else in  
13 the world, would deter him or would teach him a better  
14 lesson than he has already learned. As Mr. Ahearn put  
15 it in the probation report, Nelson Cruz is committed to  
16 the work ethic. Would incarceration deepen that committ-  
17 ment or profit society in any way? Nelson Cruz has  
18 learned that there is no easy road to achieving his am-  
19 bition. There is no easy way. He will have to work and  
20 work hard to realize his dream. This has not been an  
21 experience that Nelson Cruz will soon forget. He will  
22 remember it and struggle and I hope and I believe that  
23 he will be able to avoid repeating it.

24 The last several months have been for Nelson  
25 Cruz a nightmare. I know that your Honor will be fair.

1 bjmjt

2 I ask no more than that.

3 All Nelson Cruz asks is that the nightmare end  
4 so that he can begin once again to take his steps toward  
5 realizing his dream. Thank you.

6 THE COURT: Mr. Cruz, you have a right to speak  
7 for yourself, now.

8 Is there anything you want to say?

9 THE DEFENDANT: All the people that have been  
10 involved with me in the last few months, my family --  
11 may I have a drink of water?

12 THE COURT: Why don't you sit down for a second  
13 until he gets the water, Mr. Cruz.

14 (Pause.)

15 THE DEFENDANT: The people that have been in-  
16 volved with me, the probation officer, the lawyer, my  
17 family, and they all really could not understand why I  
18 did what I did. I really did not stop to think why I  
19 did it.

20 I really did not give it much thought, and by  
21 getting depressed an' more and how sorry I am that I ever  
22 did it. I did not want to have anybody get hurt. I  
23 really hurt my family by doing what I did. That's all I  
24 have to say.

25 THE COURT: Well, I have listened to what Mr.

1 bjmjt

2 Zelermeyer said. Twice I have seen Mr. Cruz weeping in  
3 Court. There are many other appealing things about Mr.  
4 Cruz's case, but I am compelled, I think, to order Mr.  
5 Cruz in prison, and I will.

6 This is not Mr. Cruz's first encounter with the  
7 law. It is at least his third according to the pre-  
8 sentence report, and twice having committed offenses  
9 that were not trivial as I understand it. You were given  
10 your freedom, Mr. Cruz. And then this crime. It simply  
11 is not permissible to enter into this kind of crime  
12 without thinking, not intending anybody to get hurt, but  
13 helping in a situation where somebody could have been  
14 killed, for all you knew. When people approach other  
15 people with pistols, real or fake, somebody might get  
16 killed. That is what you were helping to do. You had  
17 a job and you had a family. Somebody asked you to go  
18 hijack a truck. You agreed to go along and help in that.  
19 I am compelled to send Mr. Cruz to prison.

20 Now, the question is how, and I will solicit  
21 the views of counsel on this, Mr. Zelermeyer, it is  
22 possible, given Mr. Cruz's age to sentence him as a  
23 youth adult offender which might have a benefit, if that  
24 is a benefit, of resulting in the end in the youth  
25 division, setting aside this conviction if he is released

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11

before the maximum time. That might take care of your deportation problem. I am not saying it will but it will be a more acceptable way of dealing with that.

Do you understand what I am saying?

MR. ZELERMYER: Yes, your Honor. I ask that you so sentence Mr. Cruz.

THE COURT: Before I do that, let me say a further thing. Under the guidelines which you have seen, if Mr. Cruz is sentenced as a youth adult offender, it is anticipated or predicted as nearly as we can predict these things that he would get out somewhere in the range of 20 to 27 months.

MR. ZELERMYER: Depending on the period of the initial sentence, to some extent, your Honor.

THE COURT: I suppose that depends in part on the period of the sentence. The youth division normally prefers an indeterminate sentence so they can look and make their own judgement. They do not prefer to be hemmed in by some Judge's specification of a precise period though I have given a specific sentence under these youth provisions.

Knowing that, you might tell me your views on behalf of Mr. Cruz whether considering everything together he would want a specifically prescribed sentence or under

1 bjmjt

12

2 the youth provisions, or whether you want him just com-  
3 mitted for the indeterminate term if you had your preference  
4 on his behalf.

5 MR. ZELERMYER: Quite frankly, your Honor, I  
6 trust your Honor's judgement in this matter better than  
7 I trust my own. I will not make a request in Mr. Cruz's  
8 behalf in one way or the other.

9 THE COURT: Maybe I spent more time brooding  
10 about this than you have, but it may not be a bad idea.  
11 I just wanted you to have an opportunity to tell me any-  
12 thing you knew or believed before I imposed the sentence.

13 MR. ZELERMYER: I appreciate that, your Honor.  
14 I have discussed it with Mr. Cruz. He has expressed no  
15 preference. Knowing your Honor's experience in the area,  
16 I leave it to your Honor.

17 THE COURT: I wish I could blush in response to  
18 that, but this is not a subject where anybody is expert.  
19 This is a subject where the parole board has the last word,  
20 and they are under a lot of uncertainties about Judges.  
21 My own judgement on behalf of Mr. Cruz in this setting is  
22 that on balance he is probably better off having a specified  
23 sentence, but subject to the provisions of youth adult  
24 offenders because at least that gives him reasonable as-  
25 surance that there is an outer limit to when he gets out,

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13

2 so I am going to formulate the sentence in those terms.

3           I am going to commit Mr. Cruz to the custody  
4       of the Attorney General for a period of two years. That  
5       sentence is imposed under Section 5010 (b) of Title 18  
6       as extended by Section 4209. The judgement will recite  
7       that it is the intention of the Court that Mr. Cruz should  
8       be deemed eligible for release from custody under Section  
9       5017(c) of Title 18 at any time when the youth division  
10      deems such release to be justified under the governing  
11      law administered by that division.

12           Having said that, I suspect that it is not very  
13      likely that Mr. Cruz will get out much under 16 months  
14      given the guidelines, but the record will show that it is  
15      the desire of the Court that his consideration for earlier  
16      release be studied thoughtfully and that the youth divi-  
17      sion not deem itself mechanically or automatically bound  
18      by any mathematical computations under the guidelines. It  
19      may be that for the reasons Mr. Zelermeyer has spoken of  
20      in his sentencing proceeding, Mr. Cruz's positive qualities,  
21      his devotion to his work and to his family, his very  
22      evident remorse, his ability to sustain himself as a  
23      law abiding citizen except for these occasional departures  
24      in the past. It may well be that these things should be  
25      deemed to justify a decision to release him well before

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14

2 the time indicated by the guidelines.

3 I would hope and expect that the youth division  
4 will not fail to pay attention to the individual circum-  
5 stances of his particular case. You may convey those  
6 thoughts to the Board of Parole, its youth division,  
7 either by transcript of these remarks or whatever way you  
8 deem useful for Mr. Cruz.

9 MR. ZELERMYER: Thank you, your Honor.

10 THE COURT: That is the judgement. Is there  
11 an open count?

12 THE CLERK: Count two is open.

13 MR. ZELERMYER: I move to dismiss count two,  
14 your Honor.

15 MR. BENTLEY: No objection.

16 THE COURT: That is granted.

17 MR. ZELERMYER: I would ask that your Honor allow  
18 at least two weeks for Mr. Cruz to get his affairs in  
19 order.

20 THE COURT: Well, two weeks is a somewhat long  
21 time. We are on Wednesday now.

22 Mr. Bentley, is there any objection?

23 MR. BENTLEY: There is no objection to a brief  
24 period. If it is going to be anything in the nature of  
25 two weeks, we would ask for a bail modification, though

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2 the defendant is presently ROR status.

3 THE COURT: Well, look, I am go... to give Mr.  
4 Cruz a week from Monday, until February 23rd at 10:30  
5 a.m., to surrender to a marshal in this courthouse.

6 Mr. Cruz, Mr. Bentley said he would like you to  
7 put up more bail if you are allowed not to surrender right  
8 now. I am not going to require you to put up more bail,  
9 but I think your lawyer will agree that I ought to caution  
10 you now that if you do not come back, that is a serious  
11 federal felony for which you can get up to five years, and  
12 the result of that would be both to affect your situation  
13 under the sentence I just imposed and to expose you to  
14 another prosecution which is a very easy situation for  
15 the prosecutor to prove. Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: So you best come back on the day  
18 that I have ordered you, February 23rd.

19 THE DEFENDANT: I will come back.

20 THE COURT: All right.

21 (Sentencing concluded.)

22

23

24

25

United States of America vs.

NELSON CRUZ  
DEFENDANT

## United States District Court for

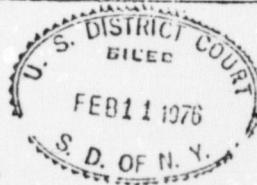
SOUTHERN DISTRICT OF NEW YORK

DOCKET NO. 3-1 75 CR 1150

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

COUNSEL	<input type="checkbox"/> WITHOUT COUNSEL      However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel. <input checked="" type="checkbox"/> WITH COUNSEL      BENJAMIN ZELERMYER, ESO <small>(Name of counsel)</small>	MONTH     DAY     YEAR
		FEBRUARY 11 1976
PLEA	<input checked="" type="checkbox"/> GUILTY, and the court being satisfied that there is a factual basis for the plea, as to count 1.  <small>There being a finding/judgment of</small>	<input type="checkbox"/> NOLO CONTENDERE, <input type="checkbox"/> NOT GUILTY <small> <input checked="" type="checkbox"/> GUILTY.</small>
FINDING & JUDGMENT	Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, and knowingly combining, conspiring, confederating and agreeing with others to commit certain offenses against the United States, to wit, violations of Section 659 of Title 18, U.S. Code. It was part of said conspiracy that defendant would unlawfully, wilfully, knowingly and with intent to convert to his own use embezzle, steal, take, carry away and conceal from a motor truck goods and chattels having a value in excess of one hundred dollars which were moving as, were part of, and constituted an interstate shipment of freight, express and other property. <small>The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and sentenced and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. Defendant is sentenced as a YOUNG ADULT CONVICTED PURSUANT TO Section 5010(b), Title 18, U.S. Code, as extended by Section 4209. It is the intention of the Court that defendant should be deemed eligible for release from custody under Section 5010(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that Division.</small>	
SENTENCE OR PROBATION ORDER	Count 2 dismissed on motion of defendant's counsel with the consent of the Government.	
SPECIAL CONDITIONS OF PROBATION	Defendant is released on his own recognizance until February 23, 1976, at 10:30 a.m., at which time he is to surrender to the U.S. Marshal.	
ADDITIONAL CONDITIONS OF PROBATION	<small>In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.</small>	
COMMITMENT RECOMMEN- DATION	<small>The court orders commitment to the custody of the Attorney General and recommends,</small> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;">           It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.         </div>	
SIGNED BY	<small> <input checked="" type="checkbox"/> U.S. District Judge  <input type="checkbox"/> U.S. Magistrate         </small>	
	<small>MARVIN E. FRANKEL</small>	

Date February 11, 1976



BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :  
-against- : 75 Cr. 1150 (MEF)  
NELSON CRUZ, : NOTICE OF MOTION  
Defendant. : TO REDUCE SENTENCE

-----x

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Benjamin Zelermeyer, sworn to May 20, 1976, and upon all prior proceedings had herein, the undersigned will move this Court, in Room 2704, United States Courthouse, Foley Square, New York, New York, on May 28, 1976, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 35, F.R.Cr.P., reducing the sentence heretofore imposed on defendant Nelson Cruz, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
May 20, 1976

Yours, etc.

MORRISON, PAUL, STILLMAN &amp; BEILEY

By Benjamin Zelermeyer  
A Member of the Firm  
Attorney for Defendant Nelson Cruz  
110 East 59th Street  
New York, New York 10022  
212/593-0100

TO:

ROBERT B. FISKE, JR., Esq.  
United States Attorney for the  
Southern District of New York  
One St. Andrew's Plaza  
New York, New York 10007  
Attn: Allen R. Bentley, Esq.  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA :  
: 75 Cr. 1150 (MEF)  
-against- : AFFIDAVIT IN SUPPORT  
NELSON CRUZ, : OF MOTION TO REDUCE  
: SENTENCE

Defendant. :  
-----x

STATE OF NEW YORK )  
)ss.:  
COUNTY OF NEW YORK )

BENJAMIN ZELERMYER, being duly sworn, says:

1. I am a member of the Bar of this Court and of the firm of Morrison, Paul, Stillman & Bailey. On December 8, 1975, I was appointed by United States Magistrate Raby to represent defendant Nelson Cruz in connection with this matter. I submit this affidavit in support of Mr. Cruz' motion, pursuant to Rule 35, F.R.Cr.P., to reduce sentence.

2. On December 23, 1975, Mr. Cruz withdrew his plea of not guilty to Count One of the indictment and entered a plea of guilty to that Count, which was accepted by the Court. Count One charged Mr. Cruz and two other defendants with conspiracy to commit interstate theft. On February 11, 1976, the Court sentenced Mr. Cruz to two years' imprisonment under 18 U.S.C. §5010(b), as extended by 18 U.S.C. §4209, and ordered that Mr. Cruz be eligible for release at any time, under 18 U.S.C. §5017(c). Mr. Cruz surrendered and began serving this sentence on February 23, 1976.

3. Shortly after Mr. Cruz had been transferred from the Metropolitan Correctional Center to the United States Correctional Institution in Petersburg, Virginia, I was informed by Mr. Yancy, Mr. Cruz' counselor, that the Bureau of Prisons

believed the sentence imposed by this Court was not permissible under 18 U.S.C. §5010(b). The Bureau's position, as Mr. Yancy related it, was that all sentences under Section 5010(b) are considered indeterminate six-year terms which the courts have no authority to limit. Mr. Yancy also informed me that a letter would be sent by the Bureau to the Court requesting clarification. Last week, I received a copy of the Bureau's letter, addressed to the United States Attorney. A copy is annexed hereto as Exhibit A. (It should be noted that I received my copy, not from the Bureau, but only after I asked Mr. Cruz to obtain one from the records office at Petersburg.)

4. Notwithstanding the fact that this Court had not yet had an opportunity to provide clarification on this subject, the Parole Board has indicated that it intends to disregard the maximum period of imprisonment ordered by this Court. Mr. Cruz informed me on Tuesday that the Parole Board has advised him it will not consider his release before November 1977 and that its determination was based on a six-year indeterminate sentence under Section 5010(b).

5. Thus, unless this Court takes some action, the two-year sentence imposed by this Court will be ignored, and Mr. Cruz may not expect to be released until he has served approximately 21 months, a considerably longer period than those customarily served on two-year sentences. Such a result will also conflict with this Court's expressed desire that Mr. Cruz be considered for early release (Transcript of sentencing, p. 13), a desire which the Parole Board apparently intends to overlook.

6. I believe that the actions of the Bureau and the Parole Board were arbitrary and without justification. This Court's sentence is supported by ample authority. I will be pleased to submit a memorandum of law on the subject if the Court so desires.

7. At this point, however, Mr. Cruz has served nearly three months of his sentence; I respectfully submit that the purposes which may have warranted incarceration have been fully

satisfied and that reduction of the duration of Mr. Cruz' incarceration to the time he has already served is the most appropriate action the Court might take.

8. As articulated in the ABA Standards Relating to the Administration of Criminal Justice, incarceration, which is ordinarily not preferred, may be warranted in order to protect the public from the defendant; to provide correctional treatment; or if a different sentence "would unduly depreciate the seriousness of the offense" (ABA Standards, SAP 2.5[c]).

9. Without presuming to speculate on the specific reasons this Court had in mind in sentencing Mr. Cruz to a term of imprisonment, I submit that continued confinement will accomplish no legitimate end.

10. Annexed hereto as Exhibits B, C, D and E are four letters I have recently received from Mr. Cruz, the last of which, addressed to the Court, Mr. Cruz has asked me to deliver for him. These letters demonstrate better than any argument I might offer that Mr. Cruz is no threat to the public and that he needs no further correctional treatment.

11. Nor will reduction of the duration of Mr. Cruz' imprisonment unduly depreciate the seriousness of the offense he committed: He has been sentenced to incarceration; he has been confined for nearly three months; he has been torn from his family and his community. Reducing the time before his release will not undo these severe consequences.

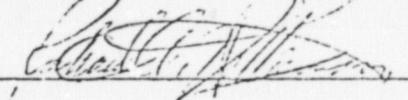
12. As the Court is already aware, Mr. Cruz' wife, Evelyn, is expecting their first child very shortly. Mrs. Cruz informed me last week that her doctor anticipates she will give birth on or before June 16, 1976, less than a month from now. Continuing Mr. Cruz' separation from his family, particularly at the time in their lives when they need each other most, attains

no socially useful objective. Indeed, because Mr. Cruz, while incarcerated, is unable to provide any financial support for his family, society is doubly burdened.

13. For all these reasons, I respectfully urge this Court to modify Mr. Cruz' sentence as follows: reduction of the term of imprisonment to the time he has already served, to be followed by an appropriate period of probation pursuant to 18 U.S.C. §5010(a). This will result in his immediate release, return him to his family, and permit Mr. Cruz the opportunity to become, once again, a useful member of our community.

  
\_\_\_\_\_  
Benjamin Zelermeyer

Sworn to before me this  
20th day of May, 1976.

  
\_\_\_\_\_  
RICHARD A. KLEMM, JR.  
NOTARY PUBLIC, State of New York  
No. 31-64111  
Qualified in New York County  
Commission Expires March 31, 1978

United States Attorney  
Southern District of New York  
U.S. Courthouse, Room 312  
Foley Square  
New York, New York 10007

Re: CRUZ, Nelson  
Reg. No. 02056-158  
Cr. 75 CR 1150

Dear Sir:

We recently received Judgement and Commitment (see attachment) from your district on the above listed case. In these orders, the Court found Mr. Cruz suitable for handling under the Youth Corrections Act but also provided that he be committed for a term of two years.

We are writing because of the inconsistency of these two provisions. The shortest possible commitment under the Youth Corrections Act requires conditional release on or before four years from the date of conviction, and unconditional release on or before six years from conviction. 18 U.S.C., 5010 (b), 5017 (c). No shorter commitment is authorized by the Youth Corrections Act. Sections 5010 (c) calls for a further or longer commitment than Section 5010 (b), and Section 5010 (d) removes the young offender from the Youth Act and sentences him under the regular sentencing provisions.

If it was Judge Frankel's intention that Mr. Cruz be treated under the Youth Corrections Act, he should be re-sentenced under Section 5010 (b) without any ceiling to the commitment other than that which is provided by the Act. On the other hand, if the Court's intention is that Mr. Cruz serve no more than a two year sentence, this would imply a finding that the defendant would not benefit from the special treatment provisions of the Youth Corrections Act, and the reference to Section 5010 (b) should be eliminated.

The correction of Mr. Cruz's sentence raises certain difficulties. We are advised by our Office of General Counsel and Review that the problem with omitting the reference to the Youth Corrections Act is that it would deprive Mr. Cruz of certain benefits, the most important of which is the opportunity to have his conviction set aside under 18 U.S.C. 5021. On the other hand, if the reference to the two year maximum is omitted,

Exhibit A

this would open up the possibility of a maximum period of confinement of six years, under the Youth Corrections Act. Since either charge is a more harsh sentencing disposition in some respect, our Office of General Counsel and Review feels that corrective action may be taken only after returning Mr. Cruz to Court. His sentence can then be vacated and he can be re-sentenced.

We would appreciate your calling this to the attention of the Court, and advising us.

Sincerely,

Joseph Weaver  
Chief Management Support

cc: General Counsel & Review,  
N/E Regional Office

E. Haynes, Records Admin  
N/E Regional Office

If at the time of his sentencing, Mr. Cruz is still under the Youth Corrections Act, he should be sentenced according to that Act. In that case, he would be eligible for parole after serving one-half of his sentence, and if he is paroled, then the sentence would not be reduced from the original sentence provisions of 18 months imprisonment, and it should stand.

The correction of Mr. Cruz's sentence would be difficult. We are advised by our Office of General Counsel and Review that the practice of editing the reference to the Youth Corrections Act in this fact would deprive Mr. Cruz of certain benefits, one of which is the opportunity to have his conviction set aside under 18 U.S.C. § 3600. On the other hand, if the defendant fails to file a motion for resentencing,

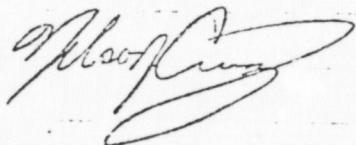
4/10/76

Dear Mr. Zelcmyer,

How are you, I'm writing this letter to let you know that I'm in good health and doing fine, despite the circumstances. I'm trying to stay out of trouble, by going to school, I'm learning how to become a machinists, this might be of some use to me in the future. I hope you enjoyed your self on your vacation, I finished the book you gave me and it's was fantastic. I'm still playing a lot of chess with some very good players, I guess you heard from my wife about the miss up to with the sentence. I hope everything will be o.k. because I don't want to be here anymore, I really have learned my lesson. I have never been apart from my wife for so long and I miss her very much, I also miss my job a lot. just the other day my ~~boss~~ boss wrote me a letter, they also seem to miss me because they said they hoped I didn't forget how to drive and hoped to see me back at the job soon - I think it is very nice of them to keep in touch with me --

I shave all ~~the~~ hair from my head and face so if you ever see me you'll never recognize me, well Sister Zimmerman, I'm not too good at writing letters as you can see from my handwriting, so I hope to hear from you soon please take care of yourself and your chess game, for we may have a chance to play each other one day (I hope its soon) until then.

Yours truly



5. If you think I should write to the judge, please let me know some of the things I should say - thank you.  
also please forgive all these errors in writing

4/19/76

Dear Mr. Zelenger,

I hope that when you receive this note you are in the best of health. I'm sending you the original sentence computation report for I'm having difficulty making a copy - anyway I here you are very busy, I'm also busy reading and the waiting and thinking about my wife, I do hope that everything will work out for the best for me, I spoke with the ~~co~~ counselor (Mr. Yancey) and he said if I got a 2 year sentence that I don't get to see the prob board, he said I would have to do  $\frac{1}{3}$  of the sentence, but if I do get a YCA 5010-B (0-6 years) that I ~~do~~ well get to see the ~~co~~ board, at this point I'm very confused and scared at what the outcome might be, I just hope that the motion to reduce sentence to time served ~~will~~ will happen in my favor, because I've really learned my lesson - I hope you will be able to understand the computation ~~and~~ record, because I don't (over)

not clearly anyway, so please see how you  
might be able to help me in doing what  
its best.

Yours truly

Miss C.

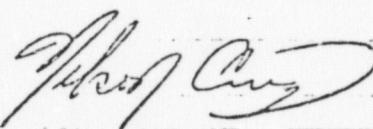
P.S.

I'm still playing chess a lot I still  
hope to play you one day even though I  
know you are the better player.

5/5/76

Dear Master Zelbomyer,  
How are you? I just came from the records office and get a copy of the letter sent to the courts by the prison. I'm sending you this copy for your records, so far I've been still keeping myself busy and haven't gotten into any trouble, I speak with my wife frequently and know that she's doing fine, but this to being her final month I'm being worried and very excited of becoming a father. If you have any suggestions as to any names (mainly girls names), please let me know, I have a few in mind but the more names the better it is for ~~me~~ to choose.

Anyway I'm due to meet with the Prob. Board sometime this week, I ~~hope~~ that the ~~Board~~ I'm not sure if the board knows how is going to handle my case because of the conflict with my sentence. I have one of the case workers representing me at the meeting. Hope to hear from you soon.

Sincerely  


5/11/76

Your Honor,

I'm writing these few words to state my involvement in the institution.

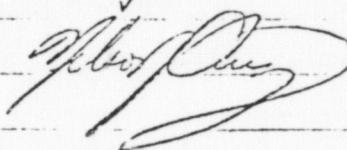
Since the first day I was incarcerated I've been trying to improve myself mentally and physically. Well I have to say that a place such as this really makes a person think. And your Honor I really have given my future a lot of thought. I'm so doing it I've been attending school, doing physical exercise, reading and most of all writing to my lovely wife. I am now training to become a machinist, this institution has the facility to train a person in quite a few constructive fields, and I decided to take advantage.

Your Honor, I've never in my life have ever miss someone so much as I do my wife, especial<sup>y</sup> now that she is about to give birth to our first child. Even though I know that the cause of this is my own stupidity, I can assure you

that I will never again get into any trouble with the law, I'm not really the type of person for a life of crime especially now that I'm a father. I have to

set an example for my child, we already promised my wife (and I make this promise to you) that she's going to dedicate my life to the bringing up a healthy and intelligent child, because I wouldn't like for he or she to be in the same situation I've faced and paid so dearly for. Your Honor I hope you take into consideration what this institutional experience has done for me. I feel it has changed me for the better, and I feel that your Honor is responsible for this change, thank you.

Sincerely yours,



June 16, 1976

Honorable Marvin E. Frankel  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: United States v. Cruz  
75 Cr. 1150 (NEF)

Dear Judge Frankel:

I am writing to supplement the Memorandum of Law we filed, at Your Honor's request, on Monday. In that Memorandum we discussed (at p. 11) the Parole Board's position with respect to Cruz' release.

This morning we received, from Mr. Cruz, official Notice of the Parole Board's action. The Notice confirms that Cruz will not be considered for release until November 1977, solely on the basis of the Board's own guidelines, and not because of any determination that Cruz, considered as an individual, needs to be confined that long. This plainly demonstrates that Your Honor's sentencing objectives will not be satisfied by the United States Board of Parole.

For the convenience of the Court, we enclose a copy of the Parole Board's Notice. A copy of this letter, with its enclosure, is also being sent to Mr. Bentley.

Very truly yours,

Benjamin Zelermeyer

BZ/lsc  
enc.

cc: Allen R. Bentley, Esq.  
bc: Nelson Cruz  
Evelyn Cruz



UNITED STATES DEPARTMENT OF JUSTICE  
United States Board of Parole  
Washington, D.C. 20537

Notice of Action

Name Nelson Cruz

Register Number 02056-158-E2 Institution Petersburg

In the case of the above-named, the Board has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release was ordered: Continue for Institutional Review hearing in Nov., 1977

REASONS: Your offense behavior has been rated as very high severity because it involved an assault on a victim and hijacking of truck.

Conditions or remarks: You have been in custody a total of 3 months. Guidelines established by the Board for youth cases which consider the above factors indicate a range of 20-27 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a

Reasons for denial, continuance or revocation: (Use separate sheet if necessary)

decision at this consideration outside the guidelines doesn't appear warranted.

*Hateful*  
*4/9/76*  
*PC*

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Director.
- B. Decision of the National Appellate Board referred to it for reconsideration. Appeal may be made to the Regional Director.
- C. Decision of the Regional Director. Appeal may be made to the National Appellate Board.
- D. Decision of Regional Directors in cases where they assumed original jurisdiction. Appeal may be made to the National Appellate Board.

May 28, 1976

(Date Notice sent)

Northeast

(Region - Specify)

mg

(Docket Clerk)

National Appellate Board

(Check)

NOTICE OF ACTION - PART II - SALIENT FACTORS

Case Name Nelson Cruz Register Number 02056-158

Item A -----  1

No prior convictions (adult or juvenile) = 2  
One or two prior convictions = 1  
Three or more prior convictions = 0

Item B -----  2

No prior incarcerations (adult or juvenile) = 2  
One or two prior incarcerations = 1  
Three or more prior incarcerations = 0

Item C -----  1

Age at first commitment (adult or juvenile) 18 years or  
older = 1  
Otherwise = 0

Item D -----  0

Commitment offense did not involve auto theft = 1  
Otherwise = 0

Item E -----  1

Never had parole revoked or been committed for a new  
offense while on parole = 1  
Otherwise = 0

Item F -----  1

No history of heroin or opiate dependence = 1  
Otherwise = 0

Item G -----  1

Has completed 12th grade or received GED = 1  
Otherwise = 0

Item H -----  1

Verified employment (or full-time school attendance) for a  
total of at least 6 months during the last 2 years in the  
community = 1  
Otherwise = 0

Item I -----  1

Release plan to live with spouse and/or children = 1  
Otherwise = 0

Total Score -----  9

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

against

RICO M. CRUZ,

73 Cr. 2150

Defendant.

OPINION

A P P E A R A N C E S:

Don. Robert B. Kicke, Jr.  
United States Attorney  
for the Southern District of New York  
New York, New York  
Attorney for United States of America

Harrison, Paul, Stillman & Bailey  
New York, New York  
Attorneys for Defendant  
Benjamin Zellerover, Esq.  
Of Counsel

FRANKEL, D.J.

Discovering that the Bureau of Prisons and the Parole Commission have decided to "reverse" (and aggravate) the unappealed judgment of this court, the defendant moves for a reduction of his sentence. While the motion may not be the precisely apt technique for cutting the bureaucratic knot, it seems obvious that the defendant is entitled to some relief. The situation and the court's disposition are as follows.

On February 11, 1976, defendant was sentenced by this court to a term of imprisonment not to exceed two years. By that sentence defendant was given the benefit of rehabilitative treatment and was specifically told to have his conviction expunged. The sentence was mitigated under the Federal Youth Corrections Act, 18 U.S.C. § 5009 et seq. ("F.Y.C.A."), as amended for "young adult offenders" by 18 U.S.C. § 5009a. The actual terms of the sentence were as follows:

"The defendant is hereby sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS. Defendant is sentenced as a YOUTH ADULT OFFENDER pursuant to Section 5010(b), Title 18, U.S. Code, as extended by Section 4109. It is the intention of the Court that defendant should be deemed eligible for release from custody under Section 5017(c), Title 18, U.S. Code, at any time when the Youth Division deems such release to be justified under the governing law administered by that division."

As is evident from the minutes of the sentencing proceeding, the court intended to place a two-year maximum on defendant's confinement. If not released earlier by the Youth Division, defendant, assuming good behavior, was thus scheduled for mandatory conditional release in no longer than eighteen months, see 18 U.S.C. §§ 5151, 4162, and would be unconditionally released after two years.

The Government made no suggestion that there might be a question about the propriety of the sentence thus imposed. There was no appeal. Some months later, however, defendant's prison adviser informed him that his sentence was to be something different because the Bureau of Prisons (subject, as is the United States Attorney, to the Attorney General) had determined that a sentence of imprisonment for life or for a fixed term short of the indeterminate maximum six years to which that Act refers. See 18 U.S.C. § 5517(a).<sup>5</sup> In effect, under the Bureau's revision of its procedure, defendant has been consigned to a six-year indefinite term and, accordingly, will not be considered for release until November 1977,<sup>6</sup> some 21 months after the sentence, notwithstanding that he is eligible for parole pursuant to 18 U.S.C. § 4205(a)<sup>7</sup> after serving eight months and is required to be released after serving approximately 19 months if he earns the usual "good time" credits. 18 U.S.C. §§ 4161, 4163.

The problem was not formally brought to the court's attention until May 20, 1976, when assigned counsel for the defendant filed the motion now before the court to reduce the sentence to the time thus far served.<sup>8</sup> The United States Attorney responded by a letter dated June 8, 1976, advising of his now-revised view that the court's sentence was indeed invalid.<sup>9</sup>

the court has concluded that the sentence imposed was valid, and that it should not be reduced even if the sentence were improper, however, the Government, having voiced no objection to the court's sentencing or by way of a letter with specificity, must treat it as valid and apply its guidelines accordingly. See United States v. Olds, 426 F.2d 665 (5th Cir. 1970). Cf. United States v. Lamp, 424 F.2d 924, 939 (9th Cir. 1970).

III.

The protracted and inordinate handling of this case by the Department of Justice is a matter obviously to be regretted and corrected. It is not tolerable that the Government's offices before the court should accept a judgment without question only to have other agencies, within the same Department, proceed to nullify it. The impact upon defendants and their sense of justice requires no long essay. The broader effect upon the vital appearance of justice is equally apparent. It must be hoped that cases like this will not recur.

In any event, as has been stated, the Government should not be free to accept a judgment in the court room, then revise it in its prisons. While the problem of military relief is somewhat involved the "X," in order, court relied upon the responsible offices of the Department of Justice to provide such relief. It is only right

## III.

Moving to the merits of the sentence in question, the court has no doubt that the issue raised by the Bureau of Prisons is substantial. Nevertheless, even if the challenge were timely, the judgment would be confirmed.

The United States Attorney now supports the view of the Bureau of Prisons that the sentence imposed herein was improper. To the same view, he responsibly cites four reported cases in which determinate sentences of less than six years have been imposed under the P.Y.C.A. As government counsel further acknowledges, these cases are only a fraction of the total in which similar sentences have been imposed. In this court alone, the number is substantial, though it has not been convenient to ascertain it with precision.

The Youth Corrections Act was "designed to make available for the discretionary use of the Federal judges a system for the sentencing and treatment of persons under the age of 21 years \*\*\* that will promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens \*\*\*" (H.R. Rep. No. 2979, 81st Cong., 2d Sess., 6 (1950)). The major objective was to broaden, not to narrow, the scope of judicial sentencing discretion by providing for individualized rehabilitative treatment for one of the few populations, the young, that are most likely to benefit from that kind of corrective discipline.

v. United States, 418 U.S. 424, 437 (1974). The Act was not intended to "deprive the court of any of its present functions as to sentencing . . . ." The Office of the Department of Justice reported to Congress: H.R. Rep. No. 1180, 86th Cong., 1st Sess. 47 (1960).

It is hard to imagine a sentencing function more basic than the determination of the minimum period of confinement. The Committee argues, however, that the Youth Corrections Act itself commanded to require the sentencing judge to choose between (1) the power of setting the minimum period of restraint by sentencing a youth as an adult, and (2) without the Act's special benefits, and (3) abdicating that ultimate power and committing the youthful offender to the custody of the Attorney General without further instruction. Such a reading is not required by the text of the Act and would do violence to its benevolent purposes.

Section 5010(b), under which the defendant was sentenced, allows the court "in lieu of the penalty of imprisonment otherwise provided by law, [to] sentence the youth offender to the custody of the Attorney General for treatment and supervision . . . until discharged by the Division as provided in section 5017(c)." Section 5017(c) requires the Parole Commission to release an offender sentenced under section 5010(b)

"conditionally \* \* \* or before the expiration  
of four years from the date of his conviction  
and \* \* \* unconditionally or before six years from  
the date of his conviction." There is nothing explicit  
about the six-year figure; it is merely the outer limit  
imposed upon the Parole Commission. In the absence of more  
specific instructions from the court, nothing of the  
cited sections explicitly prohibits the court from  
committing a youth to the custody of the Attorney General  
for a maximum term short of six years. Inferring such  
a prohibition from the equivocal terms of an Act  
which was said to "take nothing [in the way of sentencing  
discretion] away from the court" would pervert the  
legislative purpose to make no end other than a drily  
arch literalism. As far as the text of the F.Y.C.A.  
gives color to the position of the Bureau of Prisons  
and the Parole Commission, doubts are to be resolved  
in favor of lenity. See Bail v. United States, 349  
U.S. 81, 83 (1955). The Hobson's choice the Government  
now finds compulsory for the court cannot be deemed to have  
been intended by a Congress bent upon preserving the existing  
sentencing powers of the court while adding a new avenue  
for humane treatment. See Church of the Poly Trinity  
v. United States, 143 U.S. 457, 459 (1892).

The court, in considering the question, has confronted similar questions, notably in *United States v. United States*, 76 Cir., 919 F.2d 1000 (1990), and in *United States v. Torreblanca*, 522 F.2d 1253 (5th Cir. 1976); *United States v. Gandy*, 530 F.2d 1227 (5th Cir. 1976), and *United States v. Gandy*, 530 F.2d 1227 (5th Cir. 1976), which held that § 5010(e) does not apply to a criminal offense committed less than six years ago.

The last of the cases cited above, *United States v. Gandy*, involved defendant Gandy, whom the court found to have almost all of the information he sought to keep; the goal is simply to see if it is valid and authorized judgment of the court to deny his confidential petition. There may be, however, some important differences in the way of that, simply stated, here.

The defendant, Dr. James Edward A. Vassallo, the court, his attorney, and the complainants' United States Attorney are in New York, while the U.S. Commission, which is not a party here, is located in Washington, D.C. In these circumstances, the court is of the opinion that it is incident upon the attorney general to determine the situation caused by the attorney's removal from the state of New York in his capacity as attorney for the plaintiff.

BEST COPY AVAILABLE

the court's views to the Attorney General and to report to the court and defendant's counsel within ten days whether the Bureau of Prisons and the Parole Commission will administer the judgment in accordance with its terms. Should the situation remain uncorrected or irretrievably damaged, defendant's able and energetic counsel may be entitled to bring a different form of proceeding, here or in any appropriate forum, to see that the execution of the judgment is ended.

The foregoing is to declare the rights of the parties in the premises and embodies the court's order on the pending motion.

Dated, New York, New York

MARVIN E. FRANKEL

July 8, 1976

U.S.D.H.

FOOMOTES:

1. Defendant had pled guilty to conspiracy to violate 18 U.S.C. § 659. The maximum sentence for such an offense is a fine of \$5,000 and imprisonment for one year.
2. Defendant was sentenced at Bartram F.Y.C.A., because the court determined that he would benefit most from the treatment provided thereunder. See 18 U.S.C. § 4216 (formerly 18 U.S.C. § 1209 - see note 3 infra). In making this determination, the court was largely influenced by the provisions of the F.Y.C.A. which provides for the reduction of the conviction if the defendant is subsequently discharged before the expiration of the maximum sentence. See 18 U.S.C. § 5005. This opportunity is particularly important to this alien defendant (who is the husband and father of two American citizens) because his conviction, if not deported, may be grounds for his future deportation. Pursuant to 8 U.S.C. § 1251(e), an alien is deportable if "convicted of two crimes involving moral turpitude." Although the Second Circuit has not explicitly ruled on the question, cf. *Orlitzky v. United States Office of Justice*, 7, & H. Serv., 517 F.2d 426, 427 n.1 (2d Cir. 1975), it seems that exemption under 18 U.S.C. § 6021 (a) would mean conviction for purposes of 8 U.S.C. § 1251(a)(4). See *Murphy v. United States Immigration & Nat'l. Serv.*, 462 F.2d 1026, 1032 (1st Cir. 1972).
3. Under the Parole Commission and Reorganization Act, Pub.L.No. 94-233, 90 Stat. 273 (March 15, 1976), 18 U.S.C. § 4209 was reenacted as 18 U.S.C. § 4216.
4. Under the changes effected by the Parole Commission and Reorganization Act, supra, the Board of Parole has been renamed the United States Parole Commission and all references to the Youth Division in the F.Y.C.A. are replaced by the term "Commission." See 18 U.S.C. §§ 4202, 5005.
5. The Director's interpretation was essentially embodied in an undated letter to the United States Attorney from an official designated "Chief Management Support," neither defense counsel nor the assistant agent, copy of this communication. A copy was also sent to the United States Attorney's office. The letter of May 7, 1975, defense counsel, through the usual channels, attempted to obtain a copy notwithstanding the fact that the letter was addressed to the Director, Federal Bureau of Investigation, and was one which he believed had been issued in accordance with the agreement by both government and defense counsel.

6. After the instant motion was filed, the Parole Commission, in a decision dated May 25, 1976, determined that offenders would not be considered for release earlier than November 1977. This determination was apparently made under the guidelines applicable to youthful offenders sentenced for an indeterminate six-year term. See 28 C.F.R. § 2.26 (2)(7).
7. 18 U.S.C. § 4205(a), a provision of the Parole Commission Reorganization Act, for example, provides that a prisoner serving a definite term of imprisonment "shall be eligible for release on parole after serving one-third of such term" (as of April 16, 1976, 18 U.S.C. § 4202, most recently amended by the same requirement for prisoners, other than juvenile delinquents and committed youth offenders, confined for a definite term or a term of over 180 days).
8. The court is advised that some informal realization of the problem was conveyed by a Philadelphia attorney, defense counsel to offenders on probation April 5, 1976.
9. The Assistant United States Attorney in charge of the case also offered "to address the question" of what action may be taken if it could be shown that the sentence imposed was invalid.
10. The data provided to the court by the Chief Probation Officer reveal that "determinate sentences" imposed under either 18 U.S.C. § 5010(b) or (d) of the F.Y.C.A. have typically determined the split-sentence device contained in Title 18, since the determinate period of confinement is thus usually limited to a maximum of six months, with a period of probation to follow. To be sure, the text of the F.Y.C.A. more easily allows for this type of sentence since it states that nothing in the Act "shall limit or affect the power of any court to respend the imposition or execution of any sentence and place a youth offender on probation or recommit him in any wise to stand, repeat, or affect" (18 U.S.C. § 5011); 18 U.S.C. § 5023(a). But the principle is clear: a determinate sentence of less than six years, as provided for in otherwise applicable sections of Title 18, may be combined with a sentence under the F.Y.C.A. and also explicitly empowers the court to impose a determinate sentence of greater than six years, limited only by the minimum split-sentence provision for the adult offender, 18 U.S.C. § 5010(e).
11. Hearings on S. 1314 and S. 2643 before a Subcommittee of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 69 (1969).

MORRISON, PAUL, STILLEMAN  
E E

JUL 10 1976

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKM S L Z R  
AA RW GP ET FILE

UNITED STATES OF AMERICA,

-against-

NELSON CRUZ,

Defendant.

: 75 Cr. 1150

: MEMORANDUM AMENDING  
OPINION

FRANKEL, D.J.

The Opinion of July 8, 1976, is amended as follows:

At footnote 1, page i, line 3, the figure "\$5,000" is amended to read "\$10,000" and the word "ten" is amended to read "five."

It is so ordered.

Dated, New York, New York

MARVIN E. FRANKEL

July 15, 1976

U.S.D.J.

## United States Department of Justice

ADDRESS REPLY TO  
UNITED STATES ATTORNEY  
AND REFER TO  
INITIALS AND NUMBER

ARB:jrs

75-3631

UNITED STATES ATTORNEY  
SOUTHERN DISTRICT OF NEW YORK  
ONE ST. ANDREW'S PLAZA  
NEW YORK, NEW YORK 10007

uly 22, 1976

Hon. Marvin E. Frankel  
United States District Judge  
United States Courthouse  
Foley Square  
New York, New York 10007

Re: United States v. Nelson Cruz,  
75 Cr. 1150 (MEF)

Dear Judge Frankel:

Copies of the opinion of the Court dated July 8, 1976, have been sent to appropriate officials in the United States Bureau of Prisons and the United States Parole Commission. This letter is written to report to the Court, as instructed in the opinion, on "whether the Bureau of Prisons and the Parole Commission will administer the judgment in accordance with its terms."

Cruz is now scheduled for an institutional parole review hearing in November 1977, approximately 21 months after his incarceration began. He may be released from custody at that time. In any event, Cruz will not be detained beyond the two-year period fixed in the Court's judgment.

The position of the Bureau of Prisons in cases of this nature is set forth in Bureau of Prisons Policy Statement 7600.58 dated October 9, 1973, copies of which were furnished to the Court and defense counsel on July 19, 1976. Pursuant to paragraph 3(d) of the statement, Cruz will not receive "good time" credit during his incarceration.



ARB:krs  
75-3631

The position of the Parole Commission in cases of this nature is set forth in a letter from the office of its General Counsel to Assistant United States Attorney Michael Devorkin dated June 28, 1976, a copy of which is enclosed. In keeping with the considerations outlined in the letter, the Parole Commission is of the view that the sentence imposed on Cruz, and the release and termination of post-release supervision at the two-year point which it apparently compels, preclude the Commission as a matter of law from issuing Cruz a certificate under Title 18, United States Code, Section 5021.

The representations made herein are based on conversations with officials in the office of general counsel of Prisons and the Parole Commission, as well as a review of the documents cited.

Yours truly,

ROBERT B. FISKE, JR.  
United States Attorney

By: Allen R. Bentley  
ALLEN R. BENTLEY  
Assistant United States Attorney

Enclosure

CC: Benjamin Zelermeyer, Esq.  
110 East 59th Street  
New York, New York 10022

700.58

SUBJECT: PROCEDURES FOR COMMITMENTS TO A TERM OF LESS THAN SIX YEARS UNLESS THE PROVISIONS OF THE YOUTH CORRECTIONS ACT

10-9-73

1. BACKGROUND. While it has long been established that commitments to the custody of the Attorney General under the Youth Corrections Act must be under the provisions of 18 USC 5010(b) or (c), and that these commitments must be for a term of 6 years (under 5010(b) and 5017(c)), or for a term in excess of 6 years (under 5010(c) and 5017(d)), a number of courts have insisted on committing youths to a term of years of less than 6 years under the provisions of the Act.
2. POLICY. Since such commitments are not authorized by the statute, it is the policy of the Bureau of Prisons to call all such situations to the attention of the sentencing court.
- ✓3. PROCEDURE. The following procedures should be followed when a commitment of less than 6 years under the YCA is received:

- a. The Records Office will prepare, for the Chief Executive Officer's signature, a letter to the United States Attorney for the sentencing district. He will follow the guidelines shown in the appendix, explaining the position of the Bureau, and suggesting possible remedies. Copies of the letter will be forwarded to the Office of General Counsel and Review, through the Central Office Records Administrator, and to the Legal Counsel, U. S. Board of Parole.
- b. If, after a reasonable period of time and one routine 30 day follow up, no response is received, or, if the sentencing court declines to take remedial action, compute the term as follows:
  - ✓(1) If the term specified by the court is less than four years, compute the sentence without a mandatory parole date. The full term date should be modified for jail credit and imperative time, and the resulting date will be the unconditional release date (URP-FT).
  - (2) If the term specified by the court is more than four years but is less than six years, establish a mandatory parole date at four years from the date of conviction (adjusted for jail credit and imperative time). The full term date (unconditional release date) will be at the term specified by the court (adjusted for jail credit and imperative time).
- c. Immediately after the computation is done, a package, consisting of a copy of the MP-5, a copy of any negative response by the court, or in the absence of a court response, a facsimile copy of the follow up report, will be sent to the Central Office Records Administrator. A similar package will be sent to the Legal Counsel, U. S. Board of Parole.

- 2 -

- d. Statutory and extra good time (18 USC 4161 and 4162) will not be applicable to these commitments as release procedures for youth commitments are governed by 18 USC 5017, rather than by 18 USC 4163.
- e. Parole docketing will follow the procedures established for regular YCA commitments.

*Norman A. Carlson*

NORMAN A. CARLSON  
Director

United States Department of Justice  
United States Parole Commission  
Washington, D.C. 20537

June 28, 1976

Mr. Michael S. Devorkin  
Assistant U.S. Attorney  
One St. Andrews Plaza  
New York, New York 10007

Dear Mr. Devorkin:

This is in response to your letter of June 7, 1976, requesting the Commission's position with regard to sentences providing for less than six years confinement which are stated to be pursuant to the Youth Corrections Act. Such sentences pose a number of problems in their effect on the administration of parole.

Taking first the category of sentences which consist of a term of years only (less than the six year term required by 18 U.S.C. § 5010(b)), the net result of such a sentence may well be to defeat the statutory goal of providing a minimum of two years of supervision on parole once the period of confinement is served, 18 U.S.C. § 5017(c), as well as to reduce the chances of early termination of parole supervision on the basis of merit, which the Commission considers to be a prerequisite to issuance of a certificate under 18 U.S.C. § 5021. We should also note that 18 U.S.C. § 5017(b) requires a minimum of one year of supervision before the parolee can be discharged, which further reduces the possibility of a § 5021 certificate in the case of a short sentence.

While the Commission applies its Youth Act guidelines, at 23 C.F.R. § 2.20, <sup>1/</sup> to such cases regardless of length of sentence, the prisoner whose guideline range encompasses the total length of his sentence may serve to the full expiration date of his sentence, since the Bureau of Prisons does not apply the good time release statutes (18 U.S.C. §§ 4163/4) to any of the Youth Act sentences. <sup>2/</sup>

<sup>1/</sup> These guidelines provide for shorter suggested ranges of time to be served before release than do the adult guidelines, in almost all cases.

<sup>2/</sup> In the case of sentences of over four years, the Bureau of Prisons releases the prisoner on mandatory parole as required by 18 U.S.C. § 5017(c).

In addition, the two-thirds release provision of the new 18 U.S.C. § 4206(d) will not apply in most of these cases, since that section applies only to sentences of five years or more.

However, the Commission does consider such prisoners immediately eligible for parole, thus ensuring that in some cases a particular configuration of type of offense, personal background (salient factor score) and sentence length will result in a parole grant and a period of adequate supervision. However, since the time when a particular prisoner is suitable for parole release cannot be precisely determined until a parole hearing has been held (a hearing must be held before 120 days from the start of commitment), the tailoring of individual sentences of this nature to ensure an adequate period of supervision is not a task which can be accomplished with any degree of certainty at the sentencing stage.

In addition we would point out that if parole in a Youth Act case must be revoked, the period of supervision cannot be extended in the case of a willful evader of supervision or of a parolee convicted of a new crime, as can be done with most adult sentences under 18 U.S.C. § 4210(b)(2) and (c). Thus, a shorter period of supervision than the required two years may be of minimum benefit as a protection for the community.

In the case of a split sentence under 18 U.S.C. § 3651, the Commission simply does not consider such prisoners for parole during the term of confinement, in accordance with the presumed intent of the sentencing court that the set period of time be served. Since probation commences upon release, the Commission longer has jurisdiction at that point.

In conclusion, our doubts as to the legality of such sentences are based primarily on the obvious statutory purpose to provide adequate time under supervision for the successful return of the prisoner to the community, (following an appropriate period of confinement) which may be frustrated or thwarted entirely depending on the circumstances of the case and the length of sentence imposed.

I hope this letter will be of assistance to you, and we will be glad to answer any further questions you may have. In addition we are referring a copy of this letter to the Bureau of Prisons for their comment.

Sincerely,

Joseph A. Barry  
General Counsel  
*Michael G. Stover*  
Michael Stover, Attorney

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA,	:
Plaintiff,	:
-against-	:
NELSON CRUZ,	:
Defendant.	:

----- x

FRAN E., D.J.

By letter dated July 22, 1976, the United States Attorney [ ] stated the position of the Government on the administration of the court's judgment. It appears that those who have Mr. Cruz incarcerated plan to follow their own rather than the court's understanding of the judgment notwithstanding that no appeal was ever taken from that adjudication. Accordingly, as has been indicated, the court anticipates that the defendant's able counsel will proceed promptly to bring an appropriate form of action, here or elsewhere, to compel obedience to the judgment of the court. This is necessary in the court's view, since, as heretofore indicated, the motion for reduction was not an effective device (nor a procedure naming the appropriate defendants) to accomplish the correction deemed necessary.

Dated, New York, New York  
July 23, 1976

MARVIN E. FRANKEL

U.S.D.J.

FILED

~~UNITED STATES DISTRICT COURT~~JUL 19 12 00 PM '76  
*W.P.*  
*W.P.*S.D. OF N.Y.  
*W.P.*UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK-----x  
UNITED STATES OF AMERICA :

: -against-

: 75 Cr. 1150 (MEF)

NOTICE OF APPEAL

NELSON CRUZ,

Defendant. :  
-----x

Notice is hereby given that defendant Nelson Cruz appeals to the United States Court of Appeals for the Second Circuit from the Order of the United States District Court for the Southern District of New York, dated and entered July 8, 1976.

Dated: New York, New York  
July 19, 1976

MORRISON, PAUL, STILLMAN &amp; BEILEY

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TO: ROBERT B. FISKE, JR.  
 United States Attorney  
 for the Southern District of New York

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